

QUARTERLY REPORT

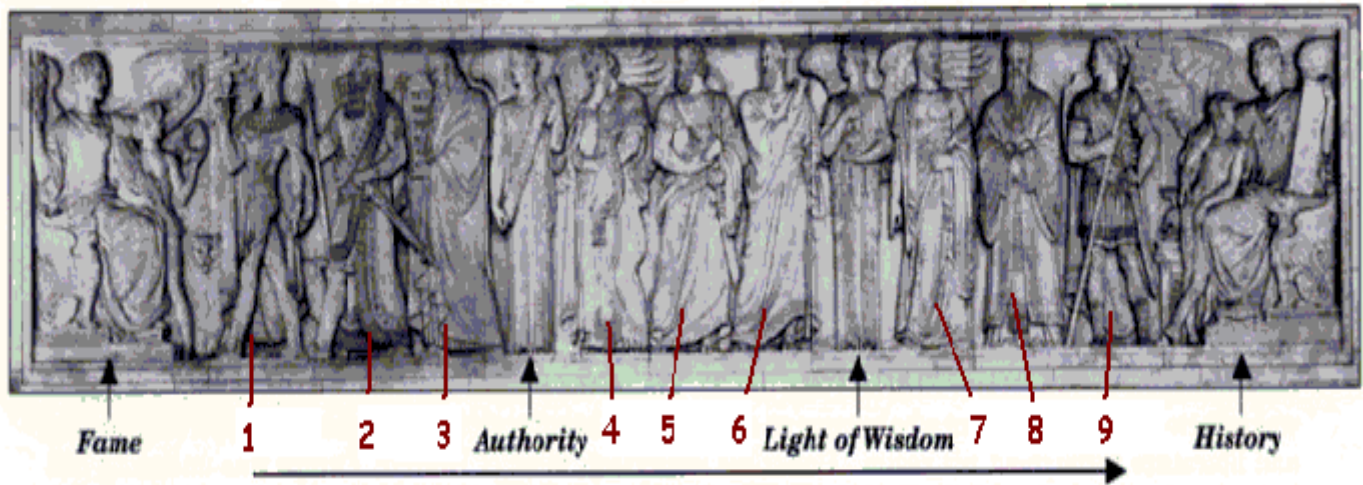
April – June 2003

The **Quarterly Report** provides information to the Indiana State Board of Education on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676, or contact him by e-mail at [<kmcdowel@doe.state.in.us>](mailto:kmcdowel@doe.state.in.us).

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HOLY MOSES, ROY'S ROCK, AND THE FRIEZE: THE DECALOGUE WARS CONTINUE



Great Lawgivers in chronological order:

- 1 Menes (c. 3200 B.C.)
- 2 Hammurabi (c. 1700 B.C.)
- 3 Moses (c. 1300 B.C.)
- 4 Solomon (c. 900 B.C.)
- 5 Lycurgus (c. 800 B.C.)
- 6 Solon (c. 638-558 B.C.)
- 7 Draco (c. 600 B.C.)
- 8 Confucius (551 - 478 B.C.)
- 9 Octavian (63 B.C. - 14 A.D.)

Legal skirmishes continue throughout the country over the display of the Decalogue in public places, although some commonality among the courts is emerging.¹ The U.S. Supreme Court has addressed this question directly only once—in *Stone v. Graham*, 449 U.S. 39, 101 S. Ct. 192 (1980)—where a Kentucky law mandating the display in public school classrooms was found unconstitutional. In that decision, the Supreme Court found that “[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian

¹As noted in “The Decalogue: Thou Shalt and Thou Shalt Not,” **Quarterly Report** April-June: 2000, the Decalogue (from the Greek for “ten words”) is more commonly known as “The Ten Commandments.” However, there is no precise numbering of commandments. As a result, the numbering of the commandments vary among faith traditions. Drawn from *Exodus* 20:2-14 and *Deuteronomy* 5:6-18, the Decalogue refers to the proscriptions against polytheism, idolatry, murder, adultery, theft, false testimony, and greed, while requiring reverence for God, respect for the Sabbath, and respect for one’s parents. These commandments were part of the revelations to Moses as detailed in Hebrew Scripture.

faiths...” 449 U.S. at 41. A majority of the court also rejected the Kentucky legislature’s proffered secular purpose for requiring the posting in the public school classrooms, declining to accept the premise the Decalogue has had any significant impact on the development of secular legal codes of the Western Civilization, including the Common Law. 449 U.S. at 45.²

But current legal disputes are not as clear as the legislative mandate in Stone v. Graham. The legal questions now involve enabling legislation (rather than mandating), passive acceptance of a donation, historical context, and context when considered within an overall display.³

The Contextual Analysis

Supreme Court Justice John Paul Stevens, in Allegheny Co. v. Greater Pittsburgh American Civil Liberties Union, 492 U.S. 573, 652-53, 109 S. Ct. 3086 (1989) (concurring in part, dissenting in part), provided an example of “contextual analysis” employed by later litigants and legislators alike in attempts to avoid the application of Stone v. Graham:

For example, a carving of Moses holding the Ten Commandments, if that is the only adornment on a courtroom wall, conveys an equivocal message, perhaps of respect for Judaism, for religion in general, or for law. The addition of carvings depicting Confucius and Mohammed may honor religion, or particular religions, to an extent that the First Amendment does not tolerate any more than it does the permanent erection of a large Latin cross on the roof of city hall. [Citations and internal punctuation omitted.] Placement of secular figures such as Caesar, Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall alongside these three religious leaders, however, signals respect not for great proselytizers but for great lawgivers. It would be absurd to exclude such a fitting message from a courtroom, as it would to exclude religious paintings by Italian Renaissance masters from a public museum.

²The three-prong test under Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S. Ct. 2105 (1971), although much maligned, is still employed, with variations on this theme. To pass constitutional muster, the challenged governmental activity (1) must have a secular purpose, (2) not have a primary effect that either advances or inhibits religion, and (3) must not foster an excessive entanglement with religion. The first two prongs (purpose and effect) are often combined into one “endorsement test.” Oftentimes, a hybrid “coercion” test is employed rather than “excessive entanglement.”

³After Stone v. Graham, Supreme Court decisions lend support to the position that, in some cases, “context” may override otherwise impermissible “content.” Allegheny Co. v. Greater Pittsburgh American Civil Liberties Union, 492 U.S. 573, 109 S. Ct. 3086 (1989), employing this approach to find a crèche on the Grand Staircase in the county courthouse violated the Establishment Clause because its preferential placement promoted a Christian holy day, whereas a Jewish menorah placed among secular symbols of the holiday did not run afoul. The “particular physical setting” indicated the menorah was not the central focus of the display (a Christmas tree was).

Justice Stevens was describing the friezes on the south wall of the U.S. Supreme Court's courtroom. 492 U.S. at 653, *n.* 13.⁴ Part of one of these friezes appears on page two.

The first major case in Indiana employing “contextual analysis” involved a monument donated in 1956 by a fraternal organization to the City of Elkhart. The monument contained a version of the Ten Commandments drawn from Jewish, Protestant and Catholic traditions. It also contained Phoenician letters, the Greek letters Chi and Rho superimposed to represent “Christos” (Christ), Judaic symbols (two Stars of David), the pyramid with the all-seeing eye found on the dollar bill, the American flag, and the American eagle.⁵ The federal district court in Books v. City of Elkhart, 79 F.Supp.2d 979 (N.D. 1999), noting that “[i]n Establishment Clause analysis dealing with religious symbols and messages, context is everything,” *Id.* at 989, found that—all things considered (location on municipal grounds with other monuments of a secular nature, the donation by private actors, the time period when it was donated, the possibility the private speech is protected religious speech)—the monument’s presence on the municipal grounds near a main entrance did not violate the Establishment Clause. The 7th Circuit, by 2-1, disagreed, reversing the district court. Books v. City of Elkhart, 235 F.3d 292 (7th Cir. 2000). The 7th Circuit noted the monument had been on the municipal grounds for over 40 years and acknowledged the city’s argument the Decalogue had both historical and cultural significance in the development of Western Civilization in addition to its religious origin. However, the first part of the Ten Commandments concerns the religious duties of believers (worshiping one God, avoiding idolatry, not using the Lord’s name in vain, and observing the Sabbath Day) rather than the arguably secular matters that follow (proscriptions on murder, adultery, stealing, false witness, and covetousness, along with requirement to honor one’s parents). 235 F.3d at 302. The 7th Circuit, as other courts have done, readily agreed that the Ten Commandments “no doubt played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order.” *Id.* However, “[a] display is unconstitutional, according to Justice Stevens [in Allegheny Co., *supra*] only when its message, evaluated in the context in which it is presented, is nonsecular.” *Id.* at 303. “[R]eligious symbols should not be considered in the abstract; instead, courts must ask whether the particular display at issue, considered in its overall context, could be said to advance religion.” *Id.* In this case, the combination of overt religious requirements with ostensibly secular ones—with no attempt to present the

⁴See “Decalogue: Epilogue,” **Quarterly Report** October-December: 2000. The tablets held by Moses, although depicting the traditional outline for the Ten Commandments, contain only four, written in Hebrew, and addressing laws with secular counterparts: “Thou shalt not kill”; “Thou shalt not commit adultery”; “Thou shalt not steal”; and “Thou shalt not bear false witness.” See Suhre v. Haywood Co., 55 F.Supp.2d 384, 393 (W.D. N.C. 1999). The Office of the Curator for the U.S. Supreme Court has developed information sheets on the various friezes and other architectural areas of interest. To see this frieze, go to www.supremecourtus.gov/about/north&southwalls.pdf.

⁵The monuments were donated to a number of municipalities during this time as part of a campaign to address moral standards among the youth. Many of these donated monuments were also part of an advertising campaign by famed Hollywood director Cecil B. De Mille to promote his 1956 movie, “The Ten Commandments.” De Mille reportedly distributed more than 2,000 replicas of the Ten Commandments throughout the nation as part of a publicity stunt. See “Suit Pans Director’s Publicity Stunt,” *Los Angeles Times*, July 27, 2003

monument in a manner that would diminish the obvious religious character—militates against a finding of constitutionality. A “symbolic union” between government and adherents of major denominations occurred in this case, the 7th Circuit wrote, because the monument was displayed at the seat of government, the monument is a permanent fixture on the grounds, and it explicitly links two religions (Judaism and Christianity) with civil government. *Id.* at 306-07.

The U.S. Supreme Court denied certiorari, Books v. City of Elkhart, 532 U.S. 1058, 121 S. Ct. 2209 (2001), but not without comment from three dissenting justices, including Chief Justice William Rehnquist. Although dissents from denials for such writs are rare—and disfavored because there is no opportunity for response from the majority—the dissent in this instance indicated the facts in this case may result in a finding of no coercion and a finding of secular purpose. “[W]e have never determined, in Stone or elsewhere, that the Commandments lack a secular application.... Undeniably..., the Commandments have a secular significance as well [as serving as a sacred text], because they have made a substantial contribution to our secular codes.” 532 U.S. at 1061. The context and history, especially as the monument sat there for over four decades without controversy, are relevant. In addition, the dissent added, even assuming there is some religious meaning associated with the monument, “the city is not bound to display only symbols that are wholly secular, or to convey solely secular messages. In determining whether a secular purpose exists, we have simply required that the displays not be ‘motivated wholly by religious considerations.’ Lynch v. Donnelly, 465 U.S. 668, 680, 79 L.Ed. 2d 604, 104 S. Ct. 1355 (1984). The fact that the monument conveys some religious meaning does not cast doubt on the city’s valid secular purposes for its display.” 532 U.S. at 1062. The dissent does not believe that, within the contextual analysis and in consideration of the monument’s long history, the monument sends any message of government endorsement of religion. *Id.*

Other courts have found the same monument donated to other municipalities did not run afoul of the Establishment Clause. See, e.g., Colorado v. Freedom From Religion Foundation, 898 P.2d 1013 (Colo. 1995). Books, however, was the first Circuit Court decision to employ a contextual analysis to such a display, although, as noted *infra*, a number of other Circuit Courts have had occasion to do so recently.⁶

⁶The first Circuit Court to address a Ten Commandment’s monument was the 10th Circuit in Anderson v. Salt Lake City Corp., 474 F.2d 29 (10th Cir. 1973), *cert. den.* 414 U.S. 879, 94 S. Ct. 50 (1973). The monument in question is the same type of monument supplied by the same fraternal organization as in Books. The federal district court for Utah found the monolith’s presence on municipal grounds, along with the municipality’s providing of lighting for the monolith, violated the Establishment Clause. The 10th Circuit reversed. However, this decision predated the Supreme Court’s decision in Stone v. Graham. As a result, the 10th Circuit has since cautioned that its decision may no longer be of precedential value. See Summan v. Callaghan, 130 F.3d 906, 910 *n.* 2, 913 *n.* 8 (10th Cir. 1997)(“more recent cases, including a Supreme Court case, cast doubt on the validity of our conclusion [in Anderson] that the Ten Commandments monolith is primarily secular in nature”). Also see Summan v. City of Ogden, 297 F.3d 995, 999 *n.* 3 (10th Cir. 2002) (“the health of our Anderson precedent is subject to question”).

Contextual Analysis: Violation of Establishment Clause

“Roy’s Rock”

Although in a legal sense the dispute was of little consequence, the rancor surrounding the so-called “Roy’s Rock” in the rotunda of the Alabama State Judicial Building captured the headlines this past summer. The principal in this dispute was Roy S. Moore, the Chief Justice of the Alabama Supreme Court. The Chief Justice position in Alabama is an elected position. During his campaign in November 2000 for the position, his campaign committee referred to him as the “Ten Commandments Judge.”⁷ The central platform of his campaign was a promise “to restore the moral foundation of law.” Glassroth v. Moore, 335 F.3d 1282, 1284 (11th Cir. 2003). To fulfill this campaign promise, Moore had installed a 5,280 pound granite monument in a prominent position in the Alabama State Judicial Building. The monument is inscribed with the King James Version of the Ten Commandments. *Id.* at 1285. Although the imposing monolith does contain some quotations from secular sources, these are placed below the Ten Commandments in an inferior position because Moore does not believe “the words of mere men should ...be placed on the same plane as the Word of God.” *Id.* at 1286. Moore had the monument installed at night. The monolith was not created with public funds. The installation was filmed by an evangelical group that used the film to raise funds for its own purposes and to establish a legal defense fund for Moore. At the unveiling of the monument, he indicated that he placed the monument where he did to remind all judges and lawyers, as well as anyone visiting the judicial building, “that in order to establish justice, we must invoke ‘the favor and guidance of Almighty God,’” quoting from Alabama’s Constitution. He also said that “our forefathers recognized the sovereignty of God,” and that to “restore morality, we must first recognize the source of that morality.” He proclaimed that the monument “marked the restoration of the moral foundation of law to our people and the return to the knowledge of God in our land.” *Id.* at 1286-87.

Three attorneys brought suit, challenging the monument’s placement as violating the Establishment Clause. The federal district court, after a seven-day bench trial agreed that Moore’s purpose in displaying the monument was non-secular and its primary effect was to advance religion. Accordingly, he ordered the monument removed from the rotunda. Glassroth v. Moore, 229 F.Supp.2d 1290 (M.D. Ala. 2002).⁸ Moore appealed to the 11th Circuit, which affirmed the federal district court’s decision.

The 11th Circuit began its decision by observing that “in religious-symbols cases, context is the touchstone.” 335 F.3d at 1284. In addition, “Establishment Clause challenges are not decided by bright-line rules, but

⁷This *nom de guerre* arose from Moore’s initial career in the judicial branch where he served as a county’s Circuit Court Judge. After taking office, he hung a hand-carved wooden plaque depicting the Ten Commandments behind the bench in his courtroom and routinely invited clergy to lead prayer at jury organizing sessions. This resulted in two well publicized lawsuits in 1995. See Glassroth v. Moore, 335 F.3d 1282, 1284 (11th Cir. 2003).

⁸There is considerable legal maneuvering in this dispute, mostly to avoid complying with the federal district court’s order. These are not recited herein because they are not germane.

on a case-by-case basis with the result turning on the specific facts.” *Id.* at 1288. The rotunda is open to the public, “but it is not a public forum where citizens can place their own displays.”⁹ In fact, Moore denied two requests to place other displays in the rotunda because “he believed that those displays would have been inconsistent with the rotunda’s theme of the moral foundation of law.” *Id.* at 1287. In one letter of denial, Moore wrote that “[t]he placement of a speech of any man alongside the revealed law of God would tend in consequence to diminish the very purpose of the Ten Commandments monument.” *Id.* At some point, Moore relented somewhat, placing two smaller displays that incorporated quotations from one of the sources so requesting. He denied an atheist group’s request to display a symbol of atheism in the rotunda. *Id.* at 1287-88.

Applying the Lemon test, the 11th Circuit agreed with the federal district court that Moore’s “purpose in displaying the monument was not secular.” This conclusion is “based...on the Chief Justice’s own words, on the monument itself, and on the physical context in which it appears.” *Id.* at 1296. This case is easily distinguished from such cases as Books because there is no “arguably secular, historical purpose, for the evidence here does not even begin to support that conclusion, nor does the evidence support the conclusion that the Ten Commandments were displayed as sort of a secular moral code.” Instead, Moore’s “words unequivocally belie such purposes.” *Id.*, quoting from the district court’s decision.

The effect created by Moore’s actions—appearance of the monument, its location and setting in the rotunda, the inclusion on its face the text of the Ten Commandments, his campaigning as the “Ten Commandments Judge,” his statements at the unveiling, that the fact the rotunda is not a public forum for speech—would lead a reasonable observer to believe Moore’s actions constituted an endorsement of religion. *Id.* at 1297.¹⁰

The 11th Circuit also devoted time to explaining what its decision does *not* do and to refuting numerous, already discredited legal theories forwarded by Moore. The court was also aware of Moore’s disinclination to recognize, much less comply, with the federal district court’s order. It threw a judicial gauntlet at Moore’s feet.

The rule of law does require that every person obey judicial orders when all available means of appealing them have been exhausted. The chief justice of a state supreme court, of all people, should be expected to abide by that principle. We do expect that if he is unable to have the district court’s order overturned through the usual appellate processes,

⁹See the two Summan cases, *infra*, from the 10th Circuit, addressing this aspect of Establishment Clause analysis.

¹⁰The 11th Circuit also made an important observation. The Establishment Clause’s “clearest command” is “that one religious denomination cannot be officially preferred over another.” But this is what Moore was doing. Moore used the King James Version of the Decalogue, a distinctly Protestant version. “Jewish, Catholic, Lutheran, and Eastern Orthodox faiths use different parts of their holy texts as the authoritative Ten Commandments.” These differences are not trivial or semantic, but reflect deep theological disputes. 335 F.3d at 1299, *n.* 3.

when the time comes, Chief Justice Moore will obey that order. If necessary, the court order will be enforced. The rule of law will prevail.

Id. at 1303. Moore resisted, but the other eight members of the Alabama Supreme Court—whom the 11th Circuit noted were not parties to Moore’s decision to place the monument in the rotunda—ordered the monument’s removal. It was removed on August 27, 2003.

Back to the 7th Circuit

The 7th Circuit, although the first to employ this analytical framework to the display of the Decalogue, is next in line to do it again. Mercier v. City of La Crosse, 2003 U.S. Dist. LEXIS 13475 (W.D. Wis. 2003) was decided July 14, 2003, and appealed to the 7th Circuit on August 25, 2003, where it is pending. Mercier involves the same type of monument supplied by the same fraternal organization. It was donated to the city in 1965 and erected in the park. In addition to the usual reasons for the monument, the fraternal organization also indicated at the time that the monument would also honor “young people who helped during the spring floods.”

After the lawsuit was filed, the city sold to the fraternal organization a small portion of the park around the monument. The organization and the city erected fences around the monolith and posted signs stating the property was owned by the organization and the city did not endorse any religious expression.

At the time the monument was erected, there were no other monuments in the park. There still are no other monuments. The monument is illuminated at night but not by the city. The fraternal organization has a spotlight affixed to its building that shines upon the monolith.¹¹

When it became evident that a lawsuit would be filed, the fraternal organization offered to relocate the monument. A local minister also offered to display the monument on church property. However, the city declined both offers and, instead, set about to sell the property around the monument to the fraternal organization for fair market value, in part because the city attorney said the 7th Circuit was “in favor” of such an approach and in part because, as the president of the Board of Park Commissioners stated, “[I don’t] like the fact that people from other areas are coming here to tell us what to do.” Id. at 8. The Freedom From Religion Foundation also offered to purchase the property surrounding the monument, but the city did not respond to the offer.

Shortly after the lawsuit was filed, the city passed a resolution indicating the property around the monument was no longer required for park purposes and sold the property to the fraternal organization conditioned

¹¹The parties already have a legal history. The Freedom From Religion Foundation sued the city in 1985, but the case was dismissed because the plaintiff could not demonstrate that it had standing to mount such a challenge. Freedom From Religion Foundation, Inc. v. Zielke, 663 F.Supp. 606 (W.D. Wisc. 1987), *affirmed*, 845 F.2d 1463 (7th Cir. 1988). The organization is one of the plaintiffs in this case.

upon the organization's installation of fencing and signage. The plot, however, does not have any natural boundaries and sits in the middle of the park. Further, the plot was sold for significantly less than nearby property had been sold. The fraternal organization erected a fence. Later, the city erected a second fence, indicating the fenced plot was private property that was not owned or maintained by the city adding "nor does the city endorse the religious expressions thereon." *Id.* at 10.

The city challenged the standing of the plaintiffs, arguing they suffered no injury and had no standing because they did not pay taxes to the city. The court, relying upon *Books*, 235 F.3d at 299, noted that, in applying the "injury in fact" test in the context of challenging the display of a religious object on public property, a plaintiff demonstrates an "injury in fact" if he has undertaken a special burden or has altered his behavior to avoid the offensive object. This "injury" need not be severe, only concrete. *Id.* at 18-20. In this case, a number of the plaintiffs had avoided the park and its environs because of the presence of the monument, which they found offensive. This was sufficient "injury in fact" to cross the threshold for standing to bring such a suit. However, the Freedom From Religion Foundation, although it has standing to bring suit on behalf of its members when the members have standing to do so on their own, is limited to injunctive relief because it alleged no injury to itself, only to its members. *Id.* at 22.

The court was not impressed with the city's *ex post facto* maneuvering, selling the land after the suit was filed, erecting fences, and placing disclaimers on the fences. A defendant's change in conduct does not render a case moot so long as the plaintiff makes a claim for damages. In this situation, the city did not change its conduct until after the lawsuit was filed. Although the 7th Circuit "has occasionally stated that this standard may be relaxed when the government is the defendant because its acts of self-correction are more trustworthy than private parties," such a "practice of granting public defendants greater deference has been applied unevenly at best." It is the defendant's burden to demonstrate the challenged behavior will not recur, but the city "has made no argument to demonstrate the monument will stay as it is now." In fact, the city did not change its behavior until it was threatened with the instant lawsuit. It has never conceded that the monument's placement in the park violated the Establishment Clause prior to the lawsuit. The controversy is not moot. It is capable of repetition. *Id.* at 27-30.

The federal district court judge acknowledged that the presence of a religious symbol on public property does not automatically or invariably violate the Establishment Clause. A court must look to the context of the display. Relying upon the 11th Circuit's contemporaneous decision in *Glassroth*, *supra*, and the 3rd Circuit's decision in *Freethought Society*, *infra*, the judge found that "The context of the monument in this case compels the conclusion that advancement of religion was both the purpose and effect of the monument as it existed before the sale." *Id.* at 30-32. The monument is the same as the one in *Books*, but even in *Books* there were at least other displays nearby. The defendant city in this case did not display the text of the Decalogue "in a way that might diminish its religious character." The fact the monument was paid for with private funds was not relevant. When the city accepted the monument, it was placed on city-owned land. Although the dedication was in part to those who helped in a recent flood, "It is undisputed that the purpose of the monument was to 'preserve the moral and religious heritage of the United States.'" The

monument was not donated because of the volunteers during the spring flood; it was donated as part of a nationwide campaign conceived long before the flood. Id. at 34-36.

“The monument was not part of a larger display of important historical legal documents but rather it stood alone in the park as the sole message being sent by defendant.” Under such context, a reasonable observer “would conclude that defendant endorsed the views embodied in the Ten Commandments.” Id. at 37.

The court found the sale of the land suspect, determining that the sale of the monument and plot to the fraternal organization did not cure the Establishment Clause violation. Although the 7th Circuit has held that “a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion,” Freedom From Religion Foundation, Inc., v. City of Marshfield, 203 F.3d 487, 491 (7th Cir. 2000), it did not endorse such a “formalistic standard” because it “invites manipulation.” To avoid such occurrences, “we look to the substance of the transaction as well as its form to determine whether government action endorsing religion has actually ceased.”

In this case, the City of La Crosse’s sale of the plot of land “was an isolated act benefitting one group,” and was done so to ensure the preservation of the monument where it stood. Id. at 39. Although it is questionable whether the plot was sold for fair market value or that the parcel was no longer needed for park purposes, the sale itself was not wholly for a secular purpose. Although such factors were considered in City of Marshfield, these factors “are not to be checked off like a laundry list so that following them creates an irrebuttable presumption that a public body has acted with a secular purpose.” Technical compliance with state law is not the ultimate question; rather, it is whether the city has “promoted or affiliated itself with any religious doctrine or organization.” Id. at 40. In this case, “defendant sold a very small parcel of land in the middle of a park to a pre-determined buyer for the purpose of preserving one religious message in the park.” Id. at 42. No other group has been allowed to place a permanent monument in the park. The city’s purpose was to insure the monument would stay where it was. “It refused or ignored plaintiff Freedom From Religion Foundation’s offer to purchase the land. There is no evidence to suggest that defendant considered selling the parcel to any other group besides the [fraternal organization].” Id. at 43.

Under defendant’s view of the law, [Alabama] Chief Justice Moore would be permitted to display the Ten Commandments in his courtroom so long as he could convince the state to sell a tiny portion of the courthouse to a private party and erect a disclaiming sign.

Id. at 48. A reasonable observer, who is aware of the history and context of the community and forum in which the display appears, would view the city’s attempts to maintain the monument on city-owned property as an endorsement of religion. Id. at 49. The judge granted the injunctive relief sought, ordering the monument removed from the park and the plot of land returned to the city. Id. at 51.

Contextual Analysis: No Violation of the Establishment Clause

History and Context

The 11th Circuit's decision was delivered on July 1, 2003. Just days earlier, on June 26, 2003, the 3rd Circuit issued its decision in Freethought Society of Greater Philadelphia v. Chester County, 334 F.3d 247 (3rd Cir. 2003). The Chester County courthouse was built in 1846. The building is on the National Register of Historic Places. In 1920, a bronze plaque displaying a Protestant version of the Decalogue prepared by an organization known as the Religious Education Council was presented to and accepted by the county commissioners in a ceremony that had both religious and secular overtones. The plaque was placed near what was then the entrance to the courthouse. However, that entrance is now closed. No effort is made to highlight the plaque or in any way celebrate its existence. Visitors now enter the courthouse through a modern addition located seventy feet to the north. A visitor would now have to climb the steps to the former entrance in order to read the text of the plaque. There would be no other reason to climb the steps other than to read the plaque. 334 F.3d at 253-54. The Freethought Society is a "forum for atheists, agnostics, freethinkers to meet, socialize and exchange ideas." *Id.* at 250. Its members were aware of the plaque as early as 1960 but did not initiate the lawsuit until 2001. A central question for the court was whether to apply First Amendment analyses to the commissioners' actions in 2001 or in 1920, over eighty (80) years earlier.

The court decided to employ principally the hybrid "endorsement test" where the Lemon prongs of purpose and effect are collapsed into a single inquiry: Would a reasonable, informed observer—i.e., one familiar with the history and context—perceive the challenged government action as endorsing religion? *Id.* The court also said it would employ that part of Lemon that would analyze whether there is a legitimate secular purpose for the County's actions, although the County's purpose need not be "exclusively secular." *Id.* at 251, citing Lynch v. Donnelly, 465 U.S. 668, 681 *n.* 6 (1984).

The three-judge panel focused on the actions of the commissioners in 2001 and the state of the courthouse at that time. Besides the Decalogue, which is dark and surrounded by columns, there are a number of other plaques and signs, some commemorating secular events and others proscribing certain activities (*e.g.*, smoking and skateboarding). 334 F.3d at 254. In August of 2001, Freethought wrote the commissioners and requested the plaque be removed. They declined, and Freethought sought injunctive relief in the federal district court. After a two-day evidentiary hearing, the district court declared the plaque unconstitutional and ordered its removal. The 3rd Circuit reversed.

The 3rd Circuit noted that the "endorsement test" employs the fictitious "reasonable observer," who is more knowledgeable than the "uninformed passerby." Such a "reasonable observer" will be aware of the "history and ubiquity" of a practice. This is relevant "because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion." *Id.* at 259 (citation omitted).

Thus, when evaluating whether the Ten Commandments plaque is an endorsement of religion by the County, we ask whether the plaque sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

Id. at 260 (citations and internal punctuation omitted). For this case, the “reasonable observer” would know the approximate age of the plaque and the fact the County has done nothing with the plaque since it was erected. Id. Although “history” is relevant, the court rejected outright a presumption of constitutionality merely because a monument or artifact is “historical,” adding that historical acceptance of a practice does not in itself validate an otherwise unconstitutional practice. On the other hand, “benign and longstanding religious references” are not necessarily unconstitutional. Id. at 260, *n.* 9.

It is relevant, the 3rd Circuit noted, that the County did nothing to maintain the monument, a consideration for finding unconstitutionality in the 7th Circuit’s Books decision, *supra*. Id. at 262. Although the Supreme Court in Stone v. Graham stated the Ten Commandments constitute an inherently sacred text, “we do not believe that Stone holds that there can never be a secular purpose for posting the Ten Commandments...” Id. The court noted the 11th Circuit, in King v. Richmond County, 331 F.3d 1271 (11th Cir. 2003), discussed *infra*, “concluded that a [discreet] depiction of the Ten Commandments can pass constitutional muster when the context of its display causes the reasonable observer to view it not as an endorsement of religion, but as serving a secular purpose.” 334 F.3d at 264. The size and placement of the symbol or object influences the analysis, as well has the history. The passage of time can alter the religious context such that a reasonable observer would view a secular purpose where a religious one may have been originally intended. Such examples include the so-called “ceremonial deism” found in the National Motto (“In God We Trust”) and the statement “God save the United States and this Honorable Court.” Id. at *n.* 11. “[I]t is significant that the Supreme Court has acknowledged the proposition that history can transform the effect of a religious practice.” Id. at 266.

The plaque in this case, the court added, poses no “real threat” but is “mere shadow.” The fact that the County has done nothing to highlight the plaque during the over 80 years it has been on the courthouse, that it closed the entrance where the plaque is located, that it did not move the plaque when it created a new entrance to the courthouse, and that it has taken no action to celebrate or otherwise draw attention to the plaque “reinforces the view of the reasonable observer that the County Commissioners maintained the plaque to preserve a longstanding plaque” and not for any overt religious purpose. Id. at 266-67. “[A] new display of the Ten Commandments is much more likely to be perceived as an endorsement of religion” by the government than one in which there is a legitimate “preservationist perspective.” Id. at 265.

Symbolism and Illiteracy

While the 3rd Circuit focused on the effect history can have on the context, the 11th Circuit addressed the traditional Decalogue symbol itself (the stone tablets). Rev. Daniel King et al. v. Richmond County, 331 F.3d 1271 (11th Cir. 2003), decided on May 30, 2003, and discussed by the 3rd Circuit in Freethought,

involved the official seal of Richmond County, Georgia, where—for the past 130 years—there appears in part the depiction of the rounded stone tablets with the Roman Numerals I-X inclusive, the traditional symbol for the Decalogue, but with no other language. The stone tablets are only part of the circular seal, which is of traditional size. State law requires counties to have such seals to authenticate legal documents. Richmond County has been using this design since about 1872, although no one knows for certain when the seal was first used or who actually designed it.

The plaintiffs filed suit, asserting the seal with its pictograph of the stone tablets violates the Establishment Clause of the First Amendment. The federal district court was unpersuaded, noting the long history of the seal and the lack of evidence the seal was designed for any religious purpose. The district court noted the purpose of the seal’s design was “lost in the mists of history,” but notwithstanding, the pictograph represents “both religious virtue and the rule of law.” Additionally, there are other secular symbols, notably a sword, and the tablets are discreetly placed. The seal also appears on the last page of a legal document, thus reducing any emphasis. The primary effect was not to advance religion, especially as the text of the Decalogue is not present. A reasonable observer, the judge found, “would view the Seal as conveying the image of a widely recognized legal code used merely to notify the reader that the stamped documents are court documents.” 331 F.3d at 1275.¹²

“[G]overnmental use of the Ten Commandments is not a *per se* violation of the purpose prong,” noting that there are constitutionally appropriate uses in a public school curriculum context. In this case, in 1872, at least 35 percent of Georgians were illiterate. The use of the stone tablets and other symbols, notably the sword, would have been “easily recognizable symbols of the law,” and although the stone tablets would have been a religious symbol, they would also be “a secular symbol for the rule of law.” *Id.* at 1276.

The 11th Circuit affirmed the district court, noting the Seal “is solely limited to the very narrow context of authenticating legal documents” and its use is “in a manner that promotes a secular purpose.” The secular context would be apparent to a reasonable observer. *Id.* at 1283. Second, the stone tablets are not the only symbol in the Seal, which “increases the probability that observers will associate the Seal with secular law rather than with religion.” *Id.* Third, the Seal “is relatively small” and “is generally placed near the bottom or on the last page of legal documents, it is also discreet.” Size and placement are relevant to any religious symbol analysis. *Id.* at 1284. Lastly, “unlike the depiction of the Ten Commandments in the *Stone* case, the text of the Commandments does not appear on the Seal,” which distinguishes this case from those disputes where the monuments prominently displayed the text. *Id.* at 1285.

¹²Although the history of the seal is not known, it was suggested—and not disputed—that the use of the stone tablets as a symbol of the law would have been readily understood and effective with a population that would have been largely illiterate. “The county proffered a plausible secular purpose, which was that the Commandments allowed illiterate Georgians to recognize the Seal as a symbol of law, and in the absence of any showing that the proffered secular purpose was implausible, we concluded that the County had satisfied the purpose prong of the *Lemon* test.” *Glassroth v. Moore*, 335 F.3d 1282, 1298 (11th Cir. 2003), citing *King*, 331 F.3d at 1278.

“Although none of the above factors, standing alone, would be sufficient to satisfy the effect test [of Lemon], in this case the combination of these four factors favors [the County’s] position. Furthermore, we note that the Seal has been in use for at least 130 years, a fact that arguably supports [the County] under the effect test.” Id. at 1286.

Enabling Legislation

Indiana

The Indiana General Assembly passed P.L. 22-2000 in its 2000 session, creating I.C. 4-20.5-21 *et seq.* and I.C. 36-1-16 *et seq.*, which permitted—but did not mandate—Indiana public schools and other local and state political subdivisions to post “[a]n object containing the words of the Ten Commandments” so long as this object is placed “along with documents of historical significance that have formed and influenced the United State’s legal or governmental system,” and the object containing the Ten Commandments is not fashioned in such a way as to draw special attention to the Ten Commandments apart from other documents and objects to be displayed. Shortly thereafter, a legislator had donated to the State for placement on the south lawn of the State Capitol a seven-foot tall monument weighing 11,500 pounds that contained, in part, the Ten Commandments. Although there were other writings on the limestone monument, the Ten Commandments text was in larger letters and had preferential location. The federal district court granted injunctive relief, preventing the erection of the monument. Indiana Civil Liberties Union, Inc., v. O’Bannon, 110 F. Supp.2d 842 (S.D. Ind. 2000). The federal district court judge viewed not only the context of the display (there are several monuments on the south lawn) but the content of the monument itself. The four-sided monument prominently displayed the Ten Commandments and made no attempt to explain the intended historical context, either to core American values or in relationship to inscriptions on the other three sides of the monument. Although the court acknowledged that religious symbols are not *per se* unconstitutional, especially when viewed in a larger context (such as works of art or school curricular objectives), the purpose for this monument was religious and not secular. The 7th Circuit affirmed, 2-1, in ICLU, Inc. v. O’Bannon, 259 F.3d 766 (7th Cir. 2001). The 7th Circuit did not state that the display of the Decalogue would always violate the Establishment Clause, but in this case, the State did not articulate a valid secular justification for the erection of this monument on public property. In addition, “[t]he permanence, content, design, and context of the monument amounts to the endorsement of religion by the state.” 259 F.3d at 773. By occupying a prominent position on the grounds of the seat of government for the State of Indiana—and with the Ten Commandments prominently displayed on the monument itself—“a reasonable observer would think that this monument...occupies this location with the support of state government. And, since we find that a reasonable observer would think the monument conveys a religious message, we hold that it impermissibly endorses religion.” Id. at 772. The U.S. Supreme Court denied certiorari, without comment. 534 U.S. 1162, 122 S. Ct. 1173 (2002).¹³

¹³The state legislator attempted to have the same monument displayed at a county courthouse. The legal result was predictable. See Kimbley v. Lawrence Co., 119 F.Supp.2d 856 (S. D. Ind. 2000).

Kentucky

Kentucky has also had a considerable amount of recent “Decalogue Litigation” apart from its original foray in Stone v. Graham, which also began with a legislative initiative. In the most recent legislation brouhaha, the governor of Kentucky in April of 2000 signed into law a Senate resolution that ordered the relocation of “the monument inscribed with the Ten Commandments which was displayed on the Capitol grounds near Kentucky’s floral clock to be made a part of a historical and cultural display which shall include the display of this resolution in order to remind Kentuckians of the Biblical foundations of the laws of the Commonwealth.”¹⁴ The monument was one of the De Mille stones donated by the fraternal organization to the State in 1971. It remained on the Capitol grounds until 1980, when it was removed and placed in storage due to construction on the Capitol grounds. Plaintiffs sought and obtained an injunction preventing the relocation of the monument. Adland et al. v. Russ, 107 F.Supp.2d 782 (E.D. Ky. 2000). The Commonwealth appealed, but the 6th Circuit Court of Appeals affirmed the federal district court. Adland et al. v. Russ, 307 F.3d 471 (6th Cir. 2002).

The Senate resolution contained a preamble with seventeen “Whereas” clauses, reciting the purpose in enacting the Resolution. Ten of these clauses quoted favorable views on religion and the Bible from famous Americans. There is also a quote from a Supreme Court decision from 1892 which, when taken out of context, appears to declare the United States a “Christian nation.” There is also the obligatory reference to the frieze at the U.S. Supreme Court, where various lawgivers, including Moses holding the traditional stone tablets, are depicted.

There would be other monuments and plaques of a secular nature near the floral clock where the resolution called for the Ten Commandments monument to be relocated. However, the Ten Commandments monument would be the largest monument in the area and very visible to any passerby, motorist or pedestrian. 307 F.3d at 476-77. The 6th Circuit found the plaintiffs had standing through the recitation of their need to visit the Capitol and its annex on business, which would require them to come into unwanted contact with the monument (the “injury in fact” found in Books by the 7th Circuit).

The stated reason for the relocation of the monument—“to remind Kentuckians of the Biblical foundations of the laws of the Commonwealth”—is “essentially the same [purported] secular purpose that the Commonwealth of Kentucky put forth in Stone” and is “insufficient, standing alone, to satisfy the secular purpose requirement” of Establishment Clause analysis. Id. at 480-481.

Although the Resolution indicated the monument was suppose to be part of a cultural and historical display, there is no mention regarding what the other components of this display would be. The other monuments and plaques were not mentioned until after litigation began. “In our view, this indicates that the other

¹⁴The federal district court decision was reported in “The Decalogue: Thou Shalt and Thou Shalt Not,” **Quarterly Report** April-June: 2000.

components of the display are an afterthought, at best, secondary in importance to the Ten Commandments, and suggests that the Commonwealth acted with a predominantly religious purpose.” Id. at 481.

The court also noted the Commonwealth referred to the Ten Commandments as “*the* precedent legal code” of the State Id. (emphasis original).

In this respect, the Ten Commandments monument is unlike the frieze on the wall of the Supreme Court, which depicts Moses carrying the Ten Commandments alongside Confucius, Mohammed, Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall. [Citation omitted.] While the Commonwealth need not commemorate every arguable historical influence on the laws of the Commonwealth or keep current with the views of every scholar to ensure compliance with the Establishment Clause, we cannot ignore its decision to focus only on the “Biblical foundations” of the law. Of course, our concern is with the religious liberty, not intellectual or academic orthodoxy. We have neither the desire nor the authority to resolve disputes about whether the Commonwealth’s legal system owes more to the Magna Carta or the Code of Hammurabi than the Ten Commandments. But that said, in addressing the Commonwealth’s avowed secular purpose for displaying an overtly religious symbol such as the Ten Commandments, we cannot ignore the Commonwealth’s adoption of a view that emphasizes a single religious influence to the exclusion of all other religious and secular influences.

Id. at 481-82. Even within a context of the proposed display, the Ten Commandments monument would “physically dwarf” all the other markers, implying “they are secondary in importance to the Ten Commandments” and suggesting that “the Commandments, and their religious message, are the primary focus of the display.” The court then held that the Commonwealth did not establish a secular purpose for the display of the monument based on the following:

- The Supreme Court has recognized the inherently religious nature of the Ten Commandments in Stone v. Graham;
- The Commonwealth failed to identify the other components of the “cultural and historical display” until litigation ensued;
- The Commonwealth focused exclusively on the Ten Commandments as the source of Commonwealth law;
- The Resolution was overtly religious; and
- The Ten Commandments monument would physically dwarf all other markers, making it the preeminent focus of the display.

Id. at 482.¹⁵ Although failure to satisfy one prong of the Lemon test (in this case, the “purpose” prong) is sufficient to find a practice unconstitutional, the 6th Circuit decided to address the “effect” prong as well. Relying upon the 7th Circuit’s decisions in both Books and O’Bannon, the 6th Circuit determined the monument—even though it had secular symbols on it, such as the American eagle—was still designed in a fashion that emphasizes a religious message. Id. at 486. In fact, “the inclusion of the American eagle gripping the national colors at the top of the monument serves to heighten the appearance of government endorsement of religion.” Id. at 487. The decision to display the monument at a location that would be “the very center of the Commonwealth’s government—the State Capitol—and site of all three branches of Kentucky government”—would lead a reasonable observer to believe it occupies this favored position with the support and approval of government. Id. at 486. The intent to post the Resolution—which the court found inherently religious—compounds the problem by amplifying the religious message of the monument and its placement. This results in the impermissible endorsement of religion, and sends an “ancillary message to members of the audience who are non-adherents that they are outsiders, not full members of the political community, and the accompanying message to adherents that they are insiders, favored members of the political community.” Id. at 489, citing and quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309-10, 120 S.Ct. 2266 (internal punctuation and additional citation omitted).

The 6th Circuit was particularly critical of the legislative maneuvering in this matter.

This case...does not present a situation where a state government, faced with considerable uncertainty regarding the constitutionality of a display with religious components, carefully deliberated to ensure that the display did not run afoul of the Establishment Clause. As to notice, the Commonwealth not only had the benefit of a Supreme Court case holding that the mere recitation of a secular purpose for the display of the Ten Commandments was not sufficient to pass Establishment Clause scrutiny, but the Commonwealth actually litigated the case. Instead of using Stone as a guidepost, the Commonwealth put forth virtually the same secular purpose in this case that the Court rejected in Stone. More importantly, instead of drafting a Resolution heeding Stone’s suggestion to integrate the Ten Commandments into a broader study, the Resolution merely mentions an unspecified “cultural and historical display” and makes no effort to identify the components of the display. It may be that rejecting a government’s avowed secular purpose is the exception rather than the rule, but on the facts of this case, we find that Kentucky’s primary purpose in drafting [the Resolution] was religious rather than secular.

¹⁵The court indicated at 307 F.3d at 483, *n.* 3 that it did not rely upon remarks that appeared in a local newspaper and attributed to a State Senator: “When the boat came to these great shores, it did not have an atheist, a Buddhist, a Hindu, a Muslim, a Christian and a Jew... Ninety-eight percent plus of these people were Christians.” The court also indicated it was not influenced by the inordinate number of recent lawsuits involving the posting of the Decalogue by Kentucky governmental entities. The court proceeded to list most of these disputes.

Id. at 483-84. The Commonwealth appealed, but the U.S. Supreme Court, on April 28, 2003, denied certiorari. Russ v. Adland, et al., 123 S. Ct. 1909 (2003).

Free Speech and Free Exercise

While history and context can sufficiently render an otherwise religious symbol secular for the purpose of Establishment Clause analysis, such displays can result in other constitutional problems, especially where an apparently disfavored viewpoint wishes to be a part of the display.

Summum v. City of Ogden, 297 F.3d 995 (10th Cir. 2002) involves the same Ten Commandments monument that has been involved in many of the other disputes: The one created in part to promote De Mille's movie, a judge's project to reclaim lost youth, and the civic endeavors of a fraternal organization. In this case, the monument was donated to the City of Ogden in 1966. The monument is flanked by a police officer memorial and a "sister city" tree with a plaque. There are also various other historical markers located on the lawn of the municipal building, but these are scattered about.

Summum is a religion formed in 1975 and chartered in Utah. It operates under a "Grand Principle of Creation" that is divided into Seven Principles (the Principles of Psychokinesis, Correspondence, Vibration, Opposition, Rhythm, Cause and Effect, and Gender). 297 F.3d at 998, *n.* 2 (with a full recitation of the meaning of the Grand Principle and Seven Principles).

Originally, Summum asked the City of Ogden to remove the monument. When the City declined, Summum asked the City to install an identical monument in the same location. This monolith would be supplied through private means, as the Ten Commandments monument is, but would bear the Seven Principles of the Summum religion. The City rejected this offer as well. Id. at 998. Summum sued, alleging violation of the First Amendment's Establishment Clause (by displaying the Ten Commandments monument) and Free Speech Clause (by refusing to display the Seven Principles monolith).

The Free Speech issue became the sole issue, although it was apparent the 10th Circuit wished to revisit its earlier decision in Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1973), where it found that the display of a similar monument by another municipality did not violate the Establishment Clause. The City of Ogden argued—and Summum conceded—that Anderson was binding precedent on the Establishment Clause claim. The 10th Circuit observed that "Summum's concession may have been unwise" because "the Establishment Clause issue is certainly not so straightforward as the City would presume," adding that Anderson was decided before the Supreme Court's decision in Stone v. Graham and without the benefit of the modern analytical framework for Establishment Clause disputes.¹⁶

As to Summum's Free Speech claim, the 10th Circuit reversed the federal district court's decision in favor of the City, finding that the City had, indeed, violated Summum's constitutional rights. The Free Speech

¹⁶Other courts have likewise questioned the viability of Anderson. See, *e.g.*, Freethought Society v. Chester Co., 334 F.3d at 269, *n.* 13

Clause extends to most speech, with limited exceptions, such as “fighting words” or the obscene. “The Seven Principles Monument does not fall within these limited exceptions and thus constitutes protected speech.” 297 F.3d at 1001. Once this was determined, the court’s analysis then looked at the identification and classification of the relevant forum to decide which standard would be applied.

Identification depends upon two considerations: (1) The government property to which access is sought; and (2) The type of access sought. *Id.* In this dispute, the government property is the lawn of the municipal building. The access sought, however, is not conversational or even to post a temporary sign: The access is to place a permanent monument on the grounds.

The next consideration is the type of forum: (1) traditional or open public forum (*e.g.*, parks and streets); (2) a designated public forum (transforming an otherwise nonpublic forum into a traditional public forum, usually on a temporary basis); or (3) a nonpublic forum, including a limited public forum (where government retains the right to curtail speech so long as such restrictions are viewpoint neutral and reasonable for the maintenance of the forum’s particular official uses, government allows selective access to some speakers for some types of speech in a nonpublic forum but does not open the property sufficiently to become a designated public forum). *Id.* at 1002.

The 10th Circuit determined the forum was a nonpublic forum, requiring any restrictions on speech to be reasonable and viewpoint neutral. The City argued, in part, that it had adopted the speech on the donated Ten Commandments monument, and, as a result, “is the only party speaking.” Whether a sign constitutes government speech is subject to four (4) factors initially identified in Knights of the Ku Klux Klan v. University of Missouri, 203 F.3d 1085, 1093-94 (8th Cir. 2000) and adopted by the 10th Circuit in Wells v. City and County of Denver, 257 F.3d 1132, 1140-42 (10th Cir. 2001):

- Whether the central purpose of the sign was to promote the views of the municipality;
- Whether the municipality exercised editorial control over the content of the sign;
- Whether the literal speaker was an employee of the municipality; and
- Whether ultimate responsibility for the content of the sign rested with the municipality.

297 F.3d at 1004. The views promoted, the court found, were the views of the fraternal organization that donated the monument. The City of Ogden maintained no editorial control over the design and creation of the monument and the “literal speaker” was the fraternal organization. The fourth factor was more difficult to decide. However, the court determined that City’s “adopted speech” argument was a “post hoc rationalization,” similar to the after-the-fact activities of the Kentucky legislature when faced with litigation over the content of the cultural and historical display that was to include the Ten Commandments monument in Adland, *supra*. “[T]he City of Ogden is unable to point to any pre-litigation evidence of the City’s explicit adoption of the speech of the Ten Commandments Monument.” *Id.* at 1005-06. The City, in its briefing before the court, referred to the monument sometimes as the fraternal organization’s monument. *Id.* at 1006, *n.* 6. The court found the speech was that of the fraternal organization and had not been adopted by the municipality. *Id.* at 1006.

The 10th Circuit also rejected the City's contention that its discrimination in favor of the fraternal organization and against Summum was "reasonable based upon comparative historical relevance..." Id. The court concluded the City failed to employ adequate safeguards to ensure that the "historical relevance" criterion "did not devolve into a mere post hoc facade for viewpoint discrimination." Id. at 1006-07. There was no evidence of a written policy that controlled the placement of monuments on the lawn based upon "historical relevance" to the community, nor was there a well established practice of accepting monuments based upon such historical relevance. The City's activities cannot be justified. Its actions constituted viewpoint discrimination. Id. at 1008-09.

The court also rejected the City's Establishment Clause argument. That is, the City argued that, should it accept Summum's Seven Principles monolith, the City would violate the Establishment Clause. "The Supreme Court," the court noted, "has yet to resolve whether a municipality's interest in avoiding an Establishment Clause violation justifies viewpoint discrimination." Id. at 1009. Even though Summum may wish to have its monument displayed for the purpose of proselytizing, "we cannot conclude that the City of Ogden's acceptance of the Seven Principles Monument would have been motivated by anything other than a concern for equal access." Id. at 1010-11. The City's argument that a "reasonable observer" would conclude the City endorses Summum was likewise rejected, in part because the argument is disingenuous because it maintains the Ten Commandments Monument does not do this. "[W]e are persuaded that a reasonable observer would, instead, note the fact that the lawn of the municipal building contains a diverse array of monuments, some from a secular and some from a sectarian perspective." Id. at 1011.

The Free Speech Clause of the First Amendment compels the City of Ogden to treat with equal dignity speech from divergent religious perspectives. On these facts, the City cannot display the Ten Commandments Monument while declining to display the Seven Principles Monument.

Id. This, however, was not the first such dispute involving Summum. In Summum v. Callaghan, 130 F.3d 906 (10th Cir. 1997), Summum challenged Salt Lake County when it declined to place its Seven Principles Monument alongside the Ten Commandments Monument displayed on the front lawn of the Salt Lake County Courthouse. The monument is the same type and from the same fraternal organization involved in City of Ogden, *supra*. This one was donated in 1971 and placed in a prominent position alongside the sidewalk leading to the main entrance of the courthouse. Id. at 910. This was also the same monument that was the subject of Anderson v. Salt Lake City Corp., 475 F.2d 19 (10th Cir. 1973), a decision that found the monument's placement did not violate the Establishment Clause, a decision the 10th Circuit now questions. The district court, relying upon Anderson, dismissed Summum's complaint, noting that the monolith was secular in nature such that the County had not created a forum for religious expression, negating any right of Summum under the Free Exercise Clause to place its own monument on the lawn. Summum, proceeding under the Free Speech Clause, urged the court to reconsider the dismissal, arguing that private religious speech was fully protected under the Free Speech and Free Exercise Clauses, asserting that private speech could not be banned from a secular public forum merely because the speech is religious. Id. at 911, relying upon Pinette v. Capitol Square Review & Advisory Bd., 30 F.3d 675 (6th Cir. 1994),

affirmed, 515 U.S. 753, 115 S. Ct. 2440 (1995). The court denied Summum’s motion and dismissed the amended complaint it filed, noting that it had not been determined that the municipality’s lawn was a “public forum,” and rejecting the argument that permitting the fraternal organization to place its monument there but not Summum was inconsistent with a nonpublic forum.

The 10th Circuit reversed the district court and remanded, holding that the amended complaint sufficiently alleged the creation of a limited public forum and that the County had engaged in viewpoint discrimination in violation of Summum’s Free Speech rights. Many of the same arguments promoted—and rejected—in City of Ogden, *supra*, were also presented here, including the allegation by Summum that the County had no rules or regulations governing the placement of monuments on the courthouse lawn. “Allowing government officials to make decisions as to who may speak on county property, without any criteria or guidelines to circumscribe their power, strongly suggests the potential for unconstitutional conduct, namely favoring one viewpoint over another.” *Id.* at 920.

COURT JESTERS: JUNK MALE

Go, little letter, apace, apace,
Fly;
Fly to the light in the valley
below—
Tell my wish to her dewy
blue eye.

—Alfred, Lord Tennyson¹⁷

There was no Air Mail in Tennyson’s day, but as Britain’s Poet Laureate, he was permitted to exercise more poetic license than most. The letter most certainly did not fly. However, if the letter were otherwise delivered, one can only hope the letter was not delivered by Charles B. Buren or Tennyson would have his wish told to “her rheumy black eye.”

Buren was hired by the U.S. Postal Service on March 21, 1981. In an understatement, the 5th Circuit Court of Appeals described him “less than a model employee.” Buren v. U.S. Postal Service, 883 F.2d 429, 430 (5th Cir. 1989). Buren was fired two years later because, in the argot of the day, he

¹⁷From his poem *The Letter*. Tennyson (1809-1892), Britain’s Poet Laureate (1850), is regarded as Britain’s principal poet of the Victorian age.

went “postal.”¹⁸ In his own words, he explained to the court that he “evidently beat up a lady’s three dogs,...threw the mail in the lady’s face and called the lady and her daughter a bitch.”¹⁹ For a postal worker, his delivery left something to be desired.

But “The Postman Always Dings Twice,” and “[f]or reasons not altogether clear, Buren was reinstated in 1984.”²⁰ Even though he had been rehired, Buren was far from a First-Class Male. On October 13, 1984, he became embroiled in an altercation with his supervisor, during which he held him in a bear hug and “plac[ed] a pen to the [supervisor’s] throat.” *Id.* For this incident, he was fired a second time. But he did not go quietly into the night. Instead, his next appointed round was with the Equal Employment Opportunity Commission (EEOC), where he filed at least 217 charges detailing his many grievances against the Postal Service, “including such noteworthy complaints as the failure of an area manager to say ‘please’ when requesting Buren to return a box of flag pins (intended for children) that Buren had taken.” *Id.* The EEOC, however, would not accept delivery, noting that the assault on his supervisor was a legitimate reason for Buren to be sacked. The EEOC also reprimanded Buren for “blatantly overburden[ing] the administrative system with his frivolous complaints.” *Id.*

Undeterred, Buren filed sixteen (16) different lawsuits alleging employment discrimination. When a federal district court learned of this, it ordered all the cases to be consolidated. “Nevertheless, only six days later Buren filed another *pro se* complaint against the Postal Service, listing nine new claims, and after this suit was consolidated with the others he sought to amend his complaint to add another 142 claims!” *Id.* The exasperated judge ordered Buren to file a single amended complaint listing *all* of his claims.

“Responding with zeal, Buren submitted a twenty-one-page handwritten document containing 453 numbered paragraphs.” *Id.* at 430-31. His bulk delivery of litigation kept him pretty busy. By “Buren’s own admission...[,] ‘his intense tracking of his multiple actions has so interfered with his life as to prevent his pursuit of future employment.’” *Id.* at 431, *n.* 3. The court was not impressed and granted the Postal Service’s Motion to Dismiss. The court also placed restrictions on Buren to prevent him from “going postal” with his litigation. It didn’t work. Several months later, he filed another complaint. The court dismissed it and threatened him with criminal contempt if he persisted in his litigious ways.

¹⁸To “go postal” has become a slang verb or adjective, meaning to “go berserk” or to become stressed out to the point of losing it completely. See, for example, www.wordsby.com/words/gopostal.asp. The word originated in the United States following several incidents of postal workers going berserk and shooting members of the public and co-workers in post offices.

¹⁹There is no indication that he directed this comment to any of the three dogs he beat up.

²⁰“The Postman Always Rings Twice” is a sordid novel written in 1934 by American novelist James M. Cain (1892-1977). It was later adapted to stage (1936) and made into a film twice (1946 and 1981).

The 5th Circuit wrote “Enough is enough.” *Id.* “[I]t is clear to us that this complaint is simply one more example of an ongoing pattern of vexatious, multiplicitous, and frivolous litigation that has now extended for more than four years... Buren’s litigation gives new meaning to the term ‘frivolous.’” In its own version of “Return To Sender,” the 5th Circuit affirmed the dismissal of Buren’s complaint, awarding the Postal Service double costs as well as damages.

And the court never once said “Please” to him.

QUOTABLE . . .

The human mind is so constituted that in many instances it *finds the truth* when wholly unable to *find the way* that leads to it.

“The pupil of impulse, it forc’d him along,
His conduct still right, with his argument wrong;
Still aiming at honor, yet fearing to roam,
The coachman was tipsy, the chariot drove home.”

Georgia Supreme Court Associate Justice Logan E. Bleckley in Lee v. Porter, 63 Ga. 345, 346 (Ga. 1879) (emphasis and poetry original), explaining why sometimes a court’s “ultimate conclusions” are correct even though “the reasoning of the court ... might be defective,” and that sometimes decisions are “affirmed upon a theory of the case which did not occur to the court that rendered it....”

UPDATES

*The Pledge of Allegiance*²¹

While the continuing saga of Michael Newdow v. U.S Congress et al., 292 F.3d 597 (9th Cir. 2002), awaits review by the U.S. Supreme Court, various state legislatures, in apparent response to Newdow’s successful Establishment Clause challenge to the use of the phrase “under God” in the Pledge, are creating litigation opportunities on their own. Although the United States Supreme Court has never addressed the

²¹This article was written by Adriana E. Salcedo, a third-year law student at the Indiana University School of Law–Indianapolis, who recently completed an internship with the Indiana Department of Education through the Law School’s Program on Law and State Government.

issue directly, *dicta* of the court tends to indicate a majority of the court believes the Pledge's inclusion of the words "under God" is more akin to "ceremonial deism."²² The Supreme Court granted *certiorari* on October 14, 2003, and may decide the constitutionality issue.²³

According to a recent study by the Education Commission of the States (August 2003), thirty-five (35) states have laws that require the recitation of the Pledge but with accommodation for those who object to such a recitation. Five (5) other states encourage its recitation. However, two states— Colorado and Pennsylvania—recently attempted to enact legislation that would have mandated its recitation. Colorado's law was enjoined by the federal district court for Colorado, while Pennsylvania's new law was tested in court.

In The Circle School et al. v. Phillips et al., 270 F.Supp.2d 616 (E.D. Penn. 2003), the Plaintiffs—a combination of private, non-religious schools, parents of students attending such schools, and a public school student—asserted the amended Pennsylvania Public School Code, which mandated a display of the flag and daily recitation of the Pledge of Allegiance or the National Anthem, violated the First and Fourteenth Amendments. The Defendants argued the Code represented a proper exercise of police powers. Both parties moved for summary judgment.²⁴

The student argued that because the Code includes an "opt out" provision only for the Pledge and saluting the flag,²⁵ students may not "opt out" of reciting the Anthem. Barnette²⁶ established that First Amendment rights are violated when the state compels students to recite the Pledge, salute the flag, or in some other way declare a belief. The Defendants contended, and the court agreed, that singing the Anthem is a form

²²See "The Pledge of Allegiance in Public Schools," **Quarterly Report** July-September: 2001 (Dana L. Long, Legal Counsel) for the history of the Pledge pre-Newdow.

²³The writ of *certiorari* is limited to the following questions: (1) Whether Newdow has standing to challenge as unconstitutional a public school district's policy that requires teachers to lead willing students in reciting the Pledge; and (2) whether such a policy violates the Establishment Clause of the First Amendment.

²⁴The amended law did permit religious schools to "opt out" of these provisions if compliance would violate the school's religious convictions. If a student "opts out" for religious or personal reasons, the parents of such a student are to be notified in writing of the student's refusal. 270 F.Supp.2d at 619.

²⁵The Pennsylvania Public School Code Section 7-771 (c)(1) states that "students may decline to recite the *Pledge of Allegiance* and may refrain from *saluting the flag* on the basis of religious conviction or personal belief."

²⁶West Virginia State Board of Education v. Barnette, 319 U.S. 624, 631, 642, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943).

of flag salutation because it is a way “to honor [the flag] formally and ceremoniously.”²⁷ In short, the amended law, although it didn’t specifically include recitation or singing of the National Anthem in the list of “opt out” provisions, intended to do so. The court held the Code, in this respect, did not violate Barnette, as students could “opt out” of singing or reciting the Anthem. 270 F.Supp.2d at 622.

The Student Plaintiff also alleged that the phrase “personal belief” used in the “opt out” provision, *supra*, is unconstitutionally vague because it is not defined and could result in unfettered discretion to local school officials to determine what personal beliefs are acceptable and which are not. The Defendants argued the phrase consists of words that have commonly accepted and readily ascertainable meaning. The court agreed the phrase “personal belief” has a commonly accepted and readily ascertainable meaning. *Id.* The court further explained there is no requirement for the belief to be rational or reasonable. A student only needs to state he has a personal belief that militates against the recitation of the Pledge or Anthem. Therefore, the phrase “personal belief” is not unconstitutionally vague. *Id.* at 623.

Lastly, the Student Plaintiff argued that the Code’s requirement that written notification be given to the parents of students who refuse to recite the Pledge or Anthem compels or coerces students to participate. This Code provision will only survive strict scrutiny if it is necessary to serve a compelling state interest and is narrowly tailored to achieve that end.²⁸

Evidence indicated the drafters intended for the parental notification provision to chill speech by providing a disincentive to opting out of the Code. The sponsor of the Act did so after speaking with veterans, who complained that many schools no longer routinely recite the Pledge.²⁹ *Id.* at 624. This is insufficient to withstand strict scrutiny. “[E]fficient notification of the administration of the Act is not so compelling of an interest to allow the provision to chill students’ speech. There can be no doubt that the parental notification provision [of the Act] would chill the speech of certain students who would involuntarily recite the Pledge or Anthem rather than have a notice sent to their parents.” *Id.* Also, the individualized notification is not necessary to promote the stated interest. A generalized notice to all parents would suffice to advance the State’s interest. It is not necessary to inform parents about the Act only after their child has refused recitation. Moreover, under Tinker, “regulation of student speech is generally permissible only when the

²⁷Defendants’ Motion for Summary Judgment, p. 18, n. 3 (citing the definition of salute found in Webster’s New Riverside University Dictionary at p. 1034).

²⁸Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 118, 116 L. Ed. 2d 476, 112 S. Ct. 501 (1991).

²⁹During the debate on the Act in the Pennsylvania House of Representatives, a sponsor of the Act was asked “What would be the sanctions for noncompliance . . .?” The sponsor replied, “It would be whatever sanctions the school does for other disciplinary things....” Further statements indicated that although the Act did not specifically address punishment, the sponsor viewed “refusal to recite the Pledge or Anthem as something negative for which disciplinary sanctions would be warranted.” 270 F.Supp.2d at 624.

speech would substantially disrupt or interfere with the work of the school or the rights of other students.”³⁰ The Defendants did not argue that refusing to recite the Pledge or Anthem would be substantially disruptive to the schools. Consequently, the Act cannot withstand strict scrutiny. *Id.* at 624-25.

The Parent Plaintiffs represented they have enrolled their children in specific private schools to receive exposure to certain values and philosophies, including the fostering of individuality, self-discovery, and self-learning. The Plaintiffs believe the Code undermines certain educational messages that they want their children to receive and fear an adverse effect on the ability of the schools to fulfill the schools’ missions to the students.

Because a fundamental right—the right of parents to direct the upbringing and education of their children³¹—is at issue, strict scrutiny was applied. *Id.* at 626. The Defendants argued the State has a compelling interest in providing a full educational experience for children, including the teaching of patriotism and civics, which are important for the development of the children. The court agreed that mandating recitation is “not the least restrictive means of promoting the teaching of civics,” nor is the Code narrowly tailored to the intended interest. A class that teaches the importance of civics and the students’ roles as citizens is a more narrowly tailored way to further the State’s proffered interest. Because the Code is neither narrowly tailored nor least restrictive, it does not survive the strict scrutiny analysis and is unconstitutional. *Id.* at 627.

The Private School Plaintiffs argued the Code infringed on their freedoms of association and expression by mandating that private schools begin each school day by reciting the Pledge or Anthem. The Plaintiffs argued that the First Amendment prohibits government from burdening a private organization’s expressive activity by imposing regulations that “impair the ability of the group to express those views, and only those views that it intends to express.”³² *Id.* The Plaintiffs further argued that because the Code forces private schools to express certain views by requiring the recitation, which are contrary to the School Plaintiffs’ educational philosophies, the Code restricts their right to engage only in expressive activity in which they desire.

³⁰*Saxe v. State Coll. Area Sch. Dist.*, 240 F. 3d 200, 211 (3d Cir. 2001) (citing *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969)).

³¹*Troxel v. Granville*, 530 U.S. 57, 65, 147 L.Ed. 2d 49, 120 S. Ct. 2054 (2000) (stating that, “the liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court”) (citing *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 67 L. Ed. 1042, 43 S. Ct. 625 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510. 534-535, 69 L. Ed. 1070, 45 S. Ct. 571 (1925)).

³²*Boy Scouts of America v. Dale*, 530 U.S. 640, 648, 120 S. Ct. 2446 (2000).

The Plaintiffs rely upon Boy Scouts of America v. Dale where the Supreme Court struck down a law requiring the Boy Scouts of America (BSA) to accept homosexuals.³³ The Court found that homosexuality was inconsistent with the values the Boy Scouts wished to instill, and that the State of New Jersey could not force the BSA to accept homosexuals.³⁴ The State would then be compelling the Boy Scouts to express the view that homosexuality was acceptable and would violate the Boy Scouts' freedom of expressive association.³⁵ "But the freedom of expressive association, like many freedoms, is not absolute. [The Supreme Court has] held that the freedom could be overridden by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."³⁶ As a result, strict scrutiny applies to this First Amendment right. Id. at 628.

The Plaintiffs also asserted the Code impaired their ability to express certain values and philosophies they wish to express. The Plaintiffs alleged the Code's requirement forces them to conduct a group recitation of the Pledge or Anthem and eliminates the ability of the students to make free choices. The requirement runs contrary to the Plaintiff Schools' stated value of allowing students to make individualized choices. Id.

The Defendants countered by arguing the Code did not prevent "private schools from disavowing the policy underlying the Code and from making it clear to their students that they do not share or endorse the viewpoint of the Commonwealth." Id. However, in Dale, the Court did not hold that the Boy Scouts were required to accept homosexuals because they could make it clear that they do not endorse New Jersey's homosexual-inclusive view. Rather, the Court held that New Jersey could not force the Boy Scouts to accept homosexuals because it would interfere with the BSA's beliefs.³⁷ The judge found that the Code interfered unconstitutionally with the School Plaintiffs' ability to express their values and forced them to espouse the Commonwealth's views on what constitutes patriotism. Id. at 629.

Additionally, the Plaintiffs argued the provision stating the Code does not apply "to any private or parochial school for which the display, the recitation, or the salute violates the religious conviction on which the school is based," likewise violates the Establishment Clause because it provides a benefit to some religious schools, whose religious convictions would be violated by the Act's provisions and are excused from compliance, while the Act remains applicable to all other religious schools and non-religious schools. The Plaintiffs

³³Id. at 656. See also "Being Prepared: The Boy Scouts and Litigation," **Quarterly Report** October-December: 2001.

³⁴Id. at 654-655.

³⁵Id. at 653, 656.

³⁶Id. at 648.

³⁷Dale 530 U.S. at 654-655.

argued that the Establishment Clause “prohibits, at the very least, legislation that constitutes an endorsement of one or another set of religious beliefs or of religion generally.”³⁸ Id. The Plaintiffs maintained the Commonwealth has not pursued a course of neutrality toward religion. Id. at 630.

The Supreme Court in Kiryas³⁹ stated, “ [T]here is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference, government may (and sometimes must) accommodate religious practices and may do so without violating the Establishment Clause.” In the instant case, the Code provision simply accommodates the needs of certain religious sects by alleviating a special burden. The Code, in this regard, shows a “benevolent neutrality” that permits religious exercise to exist without state sponsorship. The cases cited by Plaintiffs were each distinguishable from the present one because, in all three cases cited, the government gave a benefit to certain religious groups, which resulted in a physical loss of money, power, or control. In the present matter, the provision’s accommodation offered to some religious schools did not take away anything from the Plaintiffs. Whether certain religious schools are exempt does not affect the Plaintiffs. The State has a compelling interest in accommodating religious practice so that the State’s actions do not violate the Free Exercise Clause. The provision is narrowly tailored to meet this governmental interest. Therefore, the provision is a legitimate accommodation and does not violate the Establishment Clause. Id. at 630-31.

In summary, the student “opt out” provision did not compel students to sing the Anthem in violation of Barnette. The phrase “personal belief” has a common and readily ascertainable meaning, gives no unfettered discretion to school officials, and is not unconstitutionally vague. The parental notification provision is a viewpoint-based restriction on speech that chills student expression and cannot survive strict scrutiny. The Code also violated the Parent Plaintiffs’ Fourteenth Amendment fundamental liberty interest in directing the method of their child’s education and could not withstand strict scrutiny. The Code also violated the School Plaintiffs’ fundamental right to freedom of expressive association under the First Amendment because it unreasonably interfered with the values and philosophies the private schools wished to instill in their students. However, the accommodation language for certain religious schools is a legitimate accommodation and does not violate the Establishment Clause.

The court permanently enjoined the State from enforcing the Code.

³⁸Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 8-9, 103 L. Ed. 2d 1, 109 S. Ct. 890 (1989).

³⁹Bd. of Educ. Of Kiryas Joel Vill. Sch. Dist. V. Grumet, 512 U.S. 687, 705-06, 129 L. Ed. 2d 546, 114 S. Ct. 2481 (1994).

*Boy Scouts*⁴⁰

The Boy Scouts of America (BSA) and their local councils have been involved in a number of high-profile cases in recent years, with little evidence this trend will abate anytime soon.⁴¹ Even Congress has become involved, passing the “Boy Scouts of America Equal Access Act” as part of the No Child Left Behind Act of 2001, an act designed to protect equal access rights to facilities for the Boy Scouts. See 20 U.S.C. § 7905.

The latest dispute involved the BSA and some of its councils in Connecticut, where the BSA, because of its purported discrimination against homosexuals, was removed as an eligible entity for receipt of charitable funds from a state employee campaign. Boy Scouts of America et al. v. Wyman et al., 335 F.3d 80 (2nd Cir. 2003).

An annual workplace charitable campaign (“Campaign”) was established to “raise funds from state employees for charitable and public health, welfare, environmental, conservation and service purposes.” State employees make voluntary contributions to charities selected by them from a list of participating organizations. A State Employee Campaign Committee (“Committee”) governs the Campaign. The State does not contribute to the Committee’s budget or fund the Campaign. Operating costs are furnished by the participating charities.

An organization seeking to become eligible to receive such contributions must complete an application process. The application requires, *inter alia*:

a document signed by an officer or the executive director of a federation certifying... that the federation maintains on file the following documents for itself and for each member agency....(vii) a written policy of non-discrimination.

335 F.3d at 83. The Committee will remove an organization if it fails to adhere to the eligibility requirements or the policies and procedures of the Campaign. If the Committee withdraws a member organization’s eligibility, funds raised in the Campaign cannot be distributed to that organization.

The Connecticut Commission on Human Rights and Opportunities (CHRO) is an independent state agency “charged with the primary responsibility of determining whether discriminatory practices have occurred and what the appropriate remedy for such discrimination must be.” *Id.* at 85.

⁴⁰This article was written by Adriana E. Salcedo, a third-year law student at the Indiana University School of Law–Indianapolis, who recently completed an internship with the Indiana Department of Education through the Law School’s Program on Law and State Government.

⁴¹See “Being Prepared: The Boy Scouts and Litigation,” **Quarterly Report** October-December: 2001.

The Connecticut Rivers Council, Boy Scouts of America (collectively referred to as the “BSA”) had been an eligible entity. In its application, the BSA affirmatively answered that it had a written policy of nondiscrimination.

In October of 1999, the CHRO Executive Director indicated a concern to the Committee that by allowing the BSA to participate in the Campaign and to benefit from a fundraiser that used state resources, the state may potentially be a party to discrimination in violation of the Connecticut’s Gay Rights Law.⁴² Id. The Committee sought clarification from the BSA. The Boy Scout representative sent a letter expressing the BSA’s national position on homosexuality “[i]f an individual does indicate that they [sic] are homosexual [,] we cannot register them.” The actual text of the BSA’s national policy is as follows:

In the exercise of its constitutional rights, Boy Scouts [of America] does not employ known or avowed homosexuals as commissioned professional Scouters or in other capacities in which such employment would interfere with Scouting’s mission of transmitting values to youth. However, other jobs within Scouting are open to known or avowed homosexuals.... In the exercise of its constitutional rights, Boy Scouts [of America] does not register known or avowed homosexuals as adult volunteer leaders or youth members.

Id. Because of the apparent discrepancy between the BSA’s statement in its application that it had a nondiscrimination policy and the letter explaining the BSA’s national position on homosexuality, the Committee petitioned the CHRO for a declaratory ruling on two questions: (1) Does the BSA’s policy on sexual orientation violate any state anti-discrimination law over which CHRO has jurisdiction?; and (2) Would the inclusion of BSA-member agencies in the Campaign violate any state law? Id. at 86.

The CHRO issued a declaratory ruling that answered the second question, concluding that if the Committee were to retain the BSA in the Campaign, the state would be in violation of Connecticut’s Gay Rights Law. Id. However, the CHRO did not answer the first question. Notwithstanding, BSA was notified that it would not be able to participate in the upcoming Campaign. Subsequently, the BSA filed a complaint in the federal district court, charging violations principally of its First Amendment right to expressive association as well as certain state laws.

A few weeks after the action was filed, the U.S. Supreme Court decided Boy Scouts of America v. Dale, 530 U.S. 640, 120 S. Ct. 2446 (2000), finding that New Jersey’s application of its anti-discrimination law to compel the Boy Scouts to accept a homosexual gay activist as an assistant scoutmaster violated the BSA’s right to expressive association. The Committee sought clarification from the CHRO as to what effect the Dale decision would have on the CHRO’s previous declaration. 335 F.3d at 86.

In November of 2000, the CHRO issued a declaratory ruling answering the first question previously left unanswered. The ruling stated: (1) the BSA’s policy of excluding gay employees was covered by

⁴²Conn. Gen. Stat. § 46a-81a-46a-81r.

Connecticut's anti-discrimination statutes, but that violations would have to be determined on a case-by-case basis in light of whether the employment position was a leadership one; (2) under the Supreme Court's decision in Dale, Connecticut could not prevent the BSA from excluding openly gay men or avowed homosexuals as adult leaders; and (3) the CHRO was not prepared to rule on the legality of the BSA's exclusion of gay youths from its membership. Id. at 86-87.

In February of 2001 the CHRO finally addressed the Committee's request for clarification, concluding that Dale did not substantively impact the CHRO's declaratory ruling. On July 22, 2002, the district court granted summary judgment in favor of the defendants on all of the BSA's claims.⁴³ The appeal followed.

On appeal, the BSA argued that by conditioning its participation in the Campaign on a change in its membership policies, the defendants violated their expressive association rights. To prevail on this claim of constitutional deprivation, the BSA would first have to show that it was excluded from the Campaign because of acts protected by the First Amendment. Second, assuming the removal was a consequence of the BSA's exercise of its right to expressive association, the BSA would have to establish that the removal violated the Constitution. The BSA must demonstrate the Committee's decision to exclude it from the Campaign was either unreasonable or viewpoint discriminatory. Id. at 88.

Scope of BSA's Right to Expressive Association

The parties differed on how Dale should be read much less applied. The defendants argued that Dale only applies to openly or avowed gays who seek leadership positions in the BSA. The CHRO, which intervened in the matter, asserted that Dale requires some deference be due to an organization's assertions, first, as to what message it intends to express and, second, with respect to whether allowing a member of a given group to occupy a specified position in the organization would impair that message. Id. at 89. Regarding the effect of a certain individual occupying a given position within the organization, Dale cautions that this "is not to say that an expressive association can erect a shield against anti-discrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message." Id., quoting Dale, 530 U.S. at 653. The CHRO maintained Dale requires the court to engage in an independent evaluation of whether the inclusion of a given individual in a specific position will infringe on an organization's right to expressive association.

The CHRO urged that the exclusion of the BSA from the Campaign raised no constitutional issues at all. The Committee's decision to remove the BSA was based not on the BSA's exercise of a constitutionally protected right—the right to exclude gay activists from leadership positions—but on the BSA's stated policy of excluding all known or avowed homosexuals from non-leadership positions. 335 F.3d at 90. According to the CHRO, the BSA's participation in the Campaign was not conditioned on its relinquishing its First Amendment rights and, therefore, is not cause for constitutional concern. The CHRO's approach cannot support summary judgment for the defendants, the court observed. Id. The CHRO's interpretation would

⁴³Boy Scouts of Am. v. Wyman, 213 F. Supp. 2d 159 (D. Conn. 2002).

only justify summary judgment if the court determined the BSA's exclusion from the Campaign was in no way associated with the BSA's exclusion of gay activists from leadership positions, which the record does not clearly demonstrate. The BSA's exclusion practice under Dale is constitutionally protected. The question, the court added, is whether the removal of the BSA in these circumstances violated the Constitution. Id.

The Constitutionality Test

The effect of the removal of the BSA from the Campaign was neither direct nor immediate, since its conditioned exclusion did not rise to the level of compulsion. Consequently, Dale by itself did not mandate a result in the current case. Rather, the dispute is governed by caselaw addressing nonpublic forums. Id. at 91. Additionally, the court would have to view another line of cases dealing with the so-called "doctrine of unconstitutional conditions," where government attempts to condition receipt of government benefits upon a recipient's relinquishment of some Constitutional right. Id. Whether viewed as denial of access to a nonpublic forum or as the denial of a government benefit, the BSA's exclusion would be constitutional if the exclusion was (1) viewpoint neutral and (2) reasonable. Id. at 92.

1. Viewpoint Neutrality

The initial—and fundamental—inquiry was whether the removal of the BSA from the campaign was discrimination based on the BSA's viewpoint and whether Connecticut's Gay Rights Law is viewpoint discriminatory on its face. The court believed the law is, on its face, viewpoint neutral, but the court did agree that Connecticut's Gay Rights Law does have a "differential adverse impact on attempts to voice anti-homosexual viewpoints through the medium of expressive association," and that such "a differential adverse impact upon a given viewpoint may suffice to trigger constitutional scrutiny." Id. at 93. In this case, the purpose of the law was to protect persons from the economic and social harms concomitant with discrimination and not "to impose a price on the expression of [a] point of view." Id. at 94. The purpose of the law "is to discourage harmful conduct and not to suppress expressive association. We therefore hold that the law as enacted is viewpoint neutral." Id. at 95.

While the purpose of a law may be viewpoint neutral, the application of it may not be. The BSA asserted the defendants applied the Gay Rights Law in a viewpoint- discriminatory manner by using irregular procedures to exclude it from the Campaign that singled out the BSA for disfavored treatment. The BSA also argued that other organizations that served people of a particular sex, age, ethnicity, race and even sexual orientation were neither investigated nor excluded from the Campaign. The BSA's claims of a purported biased procedure were purely speculative, the court noted. Id. at 96.

The BSA's second argument raised a more serious question. Evidence that the defendants, without legitimate reason, "discriminated between discriminators" might be sufficient to preclude summary judgment for the defendants. The BSA, however, presented no evidence to support its claim that the law was selectively enforced against them. There is a rational distinction between those who discriminate with regard to employment and membership policies as opposed to those who discriminate based on the provision of services (*e.g.*, an organization established solely to provide services to a distinct group).

Connecticut has determined that those who discriminate in employment and membership violate its equal protection laws; those who do so in the provision of services do not. “Such a distinction is both reasonable and viewpoint neutral.” *Id.* at 97.

2. Reasonableness

The remaining constitutional question is whether the removal of the BSA from the Campaign was reasonable. The Supreme Court has held that so long as it is viewpoint neutral, a restriction in a nonpublic forum “need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation.” Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788, 808, 105 S. Ct. 3439 (1985).⁴⁴

The CHRO’s May of 2000 ruling concluded the state was sufficiently involved in the Campaign to trigger the provisions of Connecticut law that prohibited state agencies from supporting organizations that discriminated on the basis of sexual orientation. Given the level of participation of state agencies in the Campaign, the 2nd Circuit could not say the CHRO’s interpretation was unreasonable. 335 F.3d at 97. Because the CHRO reasonably concluded the Gay Rights Law required the BSA to be excluded from the campaign because of possible legal implications for the state itself, and given the conclusion that neither that law nor the defendants’ reliance on it was a façade for impermissible viewpoint discrimination, the Committee’s actions were a reasonable means of furthering Connecticut’s legitimate interest in preventing conduct that discriminates on the basis of sexual orientation. *Id.* at 98. The district court’s granting of summary judgment to the defendants on the First Amendment claims in this matter was affirmed. The 2nd Circuit also affirmed the district court’s summary judgment in favor of the defendants on the State law claims.

Educational Malpractice⁴⁵

Quarterly Report April-June: 2001 addressed the issue of educational malpractice by presenting a historical overview as well as a discussion of emerging liability theories. The report defined educational malpractice generally as a variation of the negligence theories used in support of medical and legal malpractice claims. The report further chronicled alternative theories, albeit variations on the same theme, along with applicable case law including: negligent misrepresentation, Sain v. Cedar Rapids Community School District, 626 N.W.2d 115 (Iowa 2001); state constitutional challenges, Donohue v. Copiague

⁴⁴Cornelius is particularly applicable. The Supreme Court upheld a law that excluded legal defense and advocacy organizations from a similar charitable campaign, this time involving federal employees, because the exclusion was both viewpoint neutral and reasonable.

⁴⁵This article was written by James D. Boyer, a second-year law student at the Indiana University School of Law-Indianapolis, who is serving as an intern with the Indiana Department of Education through the Law School’s Program on Law and State Government.

Union Free Sch. Dist., 391 N.E.2d 1352 (N.Y. 1979); breach of contract, Whayne v. U.S. Department of Education, 915 F.Supp. 1143 (D. Kan. 1996); school accountability, Helbig v. City of New York, 622 N.Y.S.2d 316 (N.Y. 1995) (assessment); and, Ambrose v. New England Assoc. of Schools and Colleges, 252 F.3d 488 (1st Cir. 2001) (accreditation). Courts generally have been reluctant to recognize educational malpractice as a tort simply because of the difficulty in demonstrating proximate cause and for ample policy reasons.⁴⁶ Moreover, claims based upon breach of contract generally have failed due to a lack of a contractual relationship between the teacher/educational entity and the student/parent. Recent cases demonstrate that courts are continuing to hold the line in refusing to recognize educational malpractice claims or assume their viability in tort actions against public schools and their employees.

Two recent decisions further address the issue of negligent misrepresentation discussed previously in Sain where the Iowa Supreme Court, contrary to legal trend, held that a high school guidance counselor was liable for giving incorrect advice to a student regarding NCAA academic eligibility requirements, which resulted in the loss of the student's athletic scholarship. 626 N.W.2d at 129.

1. First, in a factually similar case to Sain, the Wisconsin Supreme Court held that a school district was *not* liable when a guidance counselor provided inaccurate information to a high school student about NCAA academic eligibility requirements despite the presence of a counseling form available to school counselors that clearly delineated approved courses. Scott v. Savers Property and Casualty Insurance Company, 663 N.W.2d 715 (Wis. 2003). The inaccurate information cost the student his scholarship to play hockey at a Division I university. The court reasoned that the counselor's actions were discretionary and, therefore, the school district was entitled to immunity from liability under Wisconsin's tort claims act. The Wisconsin Supreme Court distinguished Sain from Scott based on Wisconsin law. The court acknowledged "the facts in *Sain* are remarkably similar to those in the present case," but even the Sain court recognized that "some states have enacted statutes giving schools and teachers immunity from any liability." Wisconsin is one of those states.⁴⁷ Id. at 728, n. 33, citing Sain, 626 N.W.2d at 127.

Regarding the student's other claims of breach of contract and promissory estoppel, the Wisconsin Supreme Court in Scott concluded that both of these claims failed as well. The court determined that a breach of contract did not exist because the counseling services offered to the student by the school district and the counselor were statutorily mandated, which meant that a legal duty existed that could not turn into a contractual duty merely through the student's request for such services. Id. at 728. The promissory estoppel claim failed because it was based upon the same allegations found in the negligence claim and, as a consequence, also came under the court's application of

⁴⁶Indiana does not recognize the tort of educational malpractice. See *Timms v. MSD of Wabash Co.*, EHLR 554:361 (S.D. Ind. 1982).

⁴⁷Indiana law grants immunity to public school teachers and counselors. See IC 34-13-3 *et seq.* Also see I.C. 20-6.1-6-15, providing immunity to school counselors from disclosing privileged or confidential information provided by a student, except where there is suspected child abuse.

government immunity under the Wisconsin statute. *Id.* at 730. The court noted, “[p]ermitting the plaintiffs to obtain damages from an immune public official through the back door opened by a claim of promissory estoppel contravenes the government immunity policy of this State” *Id.*

2. Second, in *Hendricks v. Clemson University*, 578 S.E.2d 711 (S.C. 2003), an athletic academic advisor erred in calculating the number of credits a Division II transfer student had acquired in order to be eligible to play baseball during his fourth year at the Division I school. The Clemson baseball coach informed the student during the fall that, if eligible, he would be third in line for the positions he played. Due to the advisor’s error, the student was ineligible to play for the team. In the spring of that year, the university won the NCAA regional title and advanced to the College World Series. The student sued, asserting claims for negligence, breach of contract, and breach of fiduciary duty. The South Carolina Supreme Court, which reversed the appellate court, held that Clemson did not owe the student a duty because the claim of negligence amounted to an allegation of educational malpractice, which is not actionable in South Carolina. *Id.* at 714. The court cited to *Peter W. v. San Francisco Unified Sch. Dist.*, 131 Cal. Rptr. 854 (Cal. App. 1976) and *Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992) as representative that most states decline to recognize educational malpractice claims. *Id.* at 715.

As to the claim of breach of fiduciary duty, the court concluded that a fiduciary relationship did not exist between an advisor and a student for the reason that, traditionally, such a duty is reserved to legal or business settings where one entrusts money to another. *Id.* at 716. Also, the court held that a breach of contract claim failed because the student was unable to identify any explicit or implied promise by the university in its advising capacity that would ensure academic eligibility to participate in athletics at the school. *Id.* at 717.

Decalogue: Epilogue (A literary moment)

Within the last few years, there has been a virtual explosion of litigation over displays of the Decalogue, with or without the actual text (and even the text chosen can be divisive, as noted *supra*). There is no suggestion here that the secular versions below would not likewise draw litigation, only that the lawsuits would be more entertaining. Disputes and ironic observations over or about the Ten Commandments are not recent or even novel. Ambrose Bierce (1842-1914?), American short-story writer and journalist, especially regarding the Civil War, was born in Ohio and raised in Indiana (near Warsaw in Kosciusko County), although he is later associated with California. Caustic and cynical, one of his better known works is *The Devil’s Dictionary* (1911), which contains 999 definitions collected from his newspaper columns. It was originally published as *The Cynic’s Word Book*. The following “definition” appears in his lexicon of cynicism.

DECALOGUE, *n.* A series of commandments, ten in number—just enough to permit an intelligent selection for observance, but not enough to embarrass the choice. Following is the revised edition of the Decalogue, calculated for this meridian.

Thou shalt no God but me adore:
T'were too expensive to have more.

No images nor idols make
For Robert Ingersoll⁴⁸ to break.

Take not God's name in vain; select
A time when it will have effect.

Work not on Sabbath days at all,
But go to see the teams play ball.

Honor thy parents. That creates
For life insurance lower rates.

Kill not, abet not those who kill;
Thou shalt not pay thy butcher's bill.

Kiss not thy neighbor's wife, unless
Thine own thy neighbor doth caress

Don't steal; thou'lt never thus compete
Successfully in business. Cheat.

Bear not false witness—that is low—
But “hear ‘tis rumored so and so.”

Covet thou naught that thou hast not
By hook or crook, or somehow, got.⁴⁹

⁴⁸Robert Ingersoll, the first Attorney General of Illinois, was one of the more eloquent orators of the latter part of the 19th Century. He was a “freethinker” and an agnostic, which earned him many detractors.

⁴⁹From *The Devil's Dictionary* by Ambrose Bierce (1842-1914?), American short-story writer, journalist, and social satirist. Bierce disappeared after leaving California for Mexico, ostensibly to join Pancho Villa, the Mexican revolutionary leader.

Bierce was caustic—but he wasn’t original. The English poet Arthur Hugh Clough (1819-1861) struck first in his poem, “The Latest Decalogue.”

Thou shalt have one God only; who
Would be at the expense of two?
No graven images may be
Worshipped, except the currency:
Swear not at all; for for thy curse
Thine enemy is none the worse:
At church on Sunday to attend
Will serve to keep the world thy friend:
Honour thy parents; that is, all
From whom advancement may befall:
Thou shalt not kill; but needst not strive
Officiously to keep alive:
Do no adultery commit;
Advantage rarely comes of it:
Thou shalt not steal; an empty feat,
When it’s so lucrative to cheat:
Bear not false witness: let the lie
Have time on its own wings to fly:
Thou shalt not covet; but tradition
Approves all forms of competition.

The sum of all is, thou shalt love,
If any body, God above:
At any rate shall never labour
More than thyself to love thy neighbour.⁵⁰

Date: November 6, 2003

/s/Kevin C. McDowell
Kevin C. McDowell, General Counsel
Indiana Department of Education

The **Quarterly Report** and other publications of the Legal Section of the Indiana Department of Education can be found on-line at [<www.doe.state.in.us/legal/>](http://www.doe.state.in.us/legal/).

⁵⁰From *The Poems of Arthur Hugh Clough*, A.L.P. Norrington, ed., pp. 60-61 (1968).

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